Petition

81-2115

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

PAK SHING LAM,

Defendant and Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Respondent.

PETITION FOR WRIT OF CERTIORARI

to United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a consistant pattern of intentional omissions, in a search warrant application, which omitted facts all would have undercut probable cause, is sufficient evidence of intentional falsehood or reckless disregard for the truth so as to bring this case within the Rule of Franks v. Delaware, 438 U.S. 165 (1978) in the absence of testimony by the affiant that he intended to mislead the issuing magistrate.

2. Whether a search warrant application, which seeks a warrant to search a residence for instrumentalities of crime, the presence of which is inferred solely from the suspected commission of the crime by the owner of the residence, need demonstrate, at a minimum, probable cause to arrest the suspect, in order to establish probable cause to believe that the instrumentalities will be found in his residence; or does Zurcher v. Stanford Daily, 436 U.S. 547 (1978) hold that probable cause to search, and probable cause to believe a suspect has committed a crime are two different quanta of proof.

PARTIES

Petitioner Pak Shing Lam is the defendant in a criminal action brought by the United States of America; he was represented at trial and in pre-trial motions by Robert L. Reeves, Esq., Terry M. Giles, Esq., and Robert P. App, Esq., all members of the bars of the State of California and of the United States District Court for the Central District of California; he is represented in this court by Robert P. App, a member of the bar of this court, who is associated in the practice of law with the firm of Giles, Stewart and Barnett, 1502 N. Broadway, Santa Ana, California, 92706.

Plaintiff in the action below, Respondent here, is the United States of America and was represented in the District Court and before the Court of Appeal for the Ninth Circuit by Darrell W. MacIntyre, Assistant United States Attorney for the Central District of California.

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United States v. Chesher, 654 F.2d 1285 (9th Cir. 1981)* 15, 16, 26, 27

* This opinion in Chesher has been withdrawn from the bound volume of F.2d on the grant of a rehearing en banc by the Ninth Circuit of the consolidated case, U.S. v. McConney. Chesher was, however, briefed by both parties below, and cited by the Court of Appeals in its memorandum. Its checkered history itself suggests the need for guidance by this Court. Chesher and McConney were originally reported at 640 F.2d 1069 (advance sheet No. 2, Apr. 13, 1981). That opinion was withdrawn from the bound volume on consideration of a petition for rehearing and modification (640 F.2d 1069, Editor's Note), but

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(footnote cont.) as modified was republished as cited here, at 654 F.2d 1285 (Advance Sheet No. 3, Sept. 21, 1981). The grant of rehearing en banc in the consolidated case acted to withdraw the opinion, pro tem, from the bound volumes (654 F.2d 1286) but the part of the opinion relating to the issues in Chesher would seem to remain available for citation (see Ninth Cir. Rule 21(a)).

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No.

In the Supreme Court of the United States

October Term, 1982

PAK SHING LAM

Defendant-Petitioner,

vs.

UNITED STATES OF AMERICA

Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Ninth Circuit

OPINIONS BELOW

The order from the bench of the Honorable District Court Judge Mariana R. Pfaelzer denying the motion to suppress appears in the appendix attached hereto as Exhibit I; no written opinion was issued.

The memorandum of the Court of Appeals for the Ninth Circuit, affirming the conviction, appears in the appendix attached hereto as Exhibit II; the opinion was unpublished.

JURISDICTION

The memorandum opinion of the Court of Appeal for the Ninth Circuit was filed on March 15, 1982. The jurisdiction of this court to issue a writ of certiorari is invoked under 28 U.S.C. § 1254(1) and rules 17 and 20 of the Supreme Court Rules (effective June 30, 1980). An application to stay issuance of the mandate was denied by the Court of Appeal.

CONSTITUTIONAL PROVISION INVOKED

Amendment IV to the Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On December 16, 1980, Antonio Kwong, whose wife operated a jewelry booth at Los Angeles' Jewelry Mart found a package, which had come by

mail, waiting for him at his home. Almost two hours later he delivered the package, unopened, to a substation of the Los Angeles Police Department. Kwong told the desk officer at Rampart that he thought the package was a bomb and the officer smelled gasoline. The bomb squad was called, and after removing the label, Officer Weller decided to use a special "render-safe" procedure to defuse the bomb. The "render-safe" device was triggered. The bomb, having been removed to the middle of an intersection, exploded.

One and a half months later, on January 29, 1981, a search warrant was issued for the home of Petitioner Lam on the application of a U.S. postal inspector. A quantity of material was seized pursuant to that warrant, and that material formed the nucleus of the Government's case-in-chief. An indictment was returned against Lam by a Federal Grand Jury on February 6, 1981, alleging violations of 18 U.S.C. 1716(a) (mailing explosives) and 26 U.S.C. 5861(d) (possession of an unregistered firearm). After being arraigned and pleading not guilty, Petitioner sought to suppress the evidence seized under the warrant, arguing that the warrant on

its face did not demonstrate probable cause, and further arguing that material misrepresentations and omissions existed in the search warrant application within the rule of Franks v. Delaware, 438 U.S. 154 (1978). After argument, the District Judge found probable cause to issue the warrant on the face of the affidavit, but found that defendant Lam had established a prima facie case of misrepresentations or omissions necessitating an evidentiary hearing. After hearing, the District Judge overruled the motion to suppress evidence.

The defendant was tried before a jury, and was convicted as charged. He was sentenced to two concurrent terms of one-to-five years, and he appealed raising issues relating solely to his motion to suppress. He was released on bail pending that appeal, and remains on that status.

His appeal was "heard" without oral argument, over his objection, under Local Rules of the Ninth Circuit designed to expedite decisions and eliminate the circuit's substantial backlog. By order entered March 15, his conviction was affirmed; an application to stay issuance of the mandate was denied, but as of this writing the mandate has not yet issued.

STATEMENT OF FACTS

Before the bomb was exploded the label was removed from the package (Warrant Application, hereinafter W.A. at paragraph 9), and the addresses on the label were observed to have a peculiar characteristic in that commas appeared after the street numerals (W.A. exhibits A and B). On January 16, both Mr. and Mrs. Kwong were interviewed by officers Prentiss and Brimmer of the Los Angeles Police Department and were asked about possible suspects. The only person the Kwongs could think of was defendant Lam with whom, two days earlier, Kwong had had an argument after Kwong had accused Lam, whose jewelry booth was next to the Kwongs', of cheating a customer who was a personal friend of Kwong's. (W.A. paragraph 11(a)-(b)). Kwong described Lam, according to the warrant application, as 5'6" in height, weighing 140 pounds, (W.A. paragraph 11(c)) and also noted that the use of the commas after the street numeral was characteristic of persons educated in Hong Kong, which Kwong noted Lam was. Finally, the Kwongs noted Mrs. Lam, defendant's wife, had been seen using a typewriter (W.A. at paragraph 12).

On December 23 the Postal Inspector, Elsesser, learned that Lam rented a P.O. box at the post office from which the package had been mailed, and Elsesser obtained from Post Office records Lam's California driver's license number (W.A. at paragraph 13). From information from the California Department of Motor Vehicles, Elsesser traced Lam's residence and from a Post Office employee later confirmed that Lam lived at that address (W.A. at paragraphs 14-15). By December 30 Elsesser had gotten copies of the complete driver's license application and was using Lam's photograph to show to witnesses (W.A. paragraph 15). Elsesser also obtained a fictitious business name statement completed by Lam three years before which "reveals that on two separate lines a comma appears after the numbers in the residence address of the registrant. This characteristic is identical to that which is on the address label on the bomb parcel." (W.A. paragraph 16).

On December 18, another postal inspector had interviewed the clerk, Lily Yee, who had accepted the parcel, and she could not describe the mailer except to say that he was not Caucasian or black, and that the package was well

wrapped (W.A. paragraph 20). She was interviewed again on December 23, by the L.A. police officer who had already interviewed Kwong, - and had obtained a description of Lam from Kwong - and in this interview described the mailer as "an Oriental male, approximately 5'6" in height, whom she believed to be between 20 and 50 years of age."

Between December 27 and January 13 twelve interviews were conducted of persons known, from registered mail records, to have been in line at about the same time as the mailer. The warrant application only speaks to two of those interviews, with a Mr. Efim and a Ms. Silva. Efim was shown photo identification spreads containing Lam's picture and "focused" on Lam and another oriental individual, but could not say when he had seen either individual (W.A. paragraph 23).

The second reported interview, with Ms. Silva, resulted in a description of a Mexican couple directly in front of her in line, who were diverted to a second window, and a "small, heavy Chinese man" in front of that couple, waited on by Ms. Yee just before Silva was. He was carrying a small package (W.A. paragraph 26). Silva's package was mailed right after

the bomb, and this "small, heavy Chinese man" was the mailer (W.A. paragraph 27).

The only other witness to the mailing reported in the warrant application was a security guard, Vidalis. On December 29 he was interviewed and recalled directing a Chinese family from one window to another. He also saw an oriental man wearing a golf cap in line (W.A. paragraph 24).

Finally, Postal Inspector Elsesser alleged that Kwong had told him that Lam's shop was closed on the day that the bomb was mailed and that the driver's license photo which Elsesser had obtained was of the Lam to whom she had been referring, (W.A. paragraph 31) and he alleged that when asked to mail a package "planted" by police agents, Lam used the same post office, the main terminal annex, from which the bomb had been mailed (W.A. paragraphs 28-29). The remaining portion of the warrant application recites no further facts, but only the conclusions and beliefs of the investigating officers (W.A. paragraphs 34-39).

At hearing in the District Court it was established that at the time the warrant application was prepared, Elsesser had knowledge

of, but did not disclose, the following facts:

1. Although the fictitious business name statement contained commas after two of the street numerals, a third numeral did not contain that characteristic. The D.B.A. statement was attached to the warrant application as an exhibit, however, (W.A. Exhibit B);

2. The "plant" package, though mailed by Lam, did not use any commas at all in the address. No copy of that label was attached to the warrant application. A photo of that label was marked at hearing;

3. The post office box application, referred to in the warrant application, but not attached, did not use any commas;

4. While the warrant application averred that Kwong identified a driver's license photo of Lam, when shown the composite which Elsesser thought was "strikingly similar" to the sketch prepared from that photo, Kwong said that the composite did not look like Lam, but that it looked more like a relative of his whose hair was long as was that in the composite;

5. While Elsesser averred that the use of initials on the return address of the bomb parcel was peculiar to jewelers (W.A. paragraph

34(b)) he did not disclose until hearing that the "plant package" used not initials, but a full business address for the return address;

6. At hearing, Elsesser testified that two persons interviewed by postal inspectors, when shown photo-spreads containing Lam's picture, identified other persons; of the other persons interviewed, none could identify anyone;

7. Elsesser did not disclose that Yee was shown photo spreads containing Lam's picture, and could not I.D. anyone;

8. Elsesser did not disclose that Security Guard Vidalis described the mailer as even taller than had Yee (RT 101);

9. Finally, Elsesser had averred that he had information from Clerk Yee that the mailer was about 5'6" and 140 pounds. But Elsesser, though he testified that conflicting descriptions were very important in arriving at probable cause, did not reveal in his affidavit that he had information from Lam's official driver's license application that Lam was only 5'3" and weighed only 110 pounds. The driver's license application was not attached to the warrant.

Seven hundred and seventy-four hours over a

forty-day-plus period were spent, by postal inspectors alone, in the investigation before the warrant was sought (W.A. paragraph 39). No allegation of impending flight, by Lam, was included in the application.

The Court of Appeals merely found that an affidavit which included no information which undercut probable cause, even where substantial such information did exist and was known to the affiant, did not amount to a reckless disregard for the truth.

ARGUMENT

I.

In Franks v. Delaware, 438 U.S. 154 (1978) this Court held that:

> "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event

> that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

This Court cited United States v. Damitz, 495 F.2d 50 (9th Cir. 1974) in support of the proposition that the rule which was announced found its underpinnings in the 4th Amendment; the rule has, of course, been followed by the Ninth Circuit; see, e.g., U.S. v. Young Buffalo, 591 F.2d 506 (9th Cir. 1979). Material omissions are equally subject to the Franks test. See, United States v. Lefkowitz 618 F.2d 1313 (9th Cir. 1980); United States v. Martin 615 F.2d 318 (5th Cir. 1980). See also, and compare, United States v. Taxe 540 F.2d 961 (9th Cir. 1976) and United States v. Esparza 546 F.2d 841 (9th Cir. 1976).

The test is not always, however, easily applied. In Young Buffalo, supra, the investigation had covered seven separate robberies, and the affiant was attempting to put together witness statements from twenty-three witnesses:

> " Saunders [the affiant] was required to sift through a large body of information to synthesize a description of the robber. The process necessarily involved omission and an element of distortion, but that fact alone does not establish either deliberate falsehood or reckless disregard for the truth." (id at 510)

The Buffalo District Judge had found that even without the inaccuracies alleged in the affidavit, that there existed substantial probable cause. The Circuit, testing this question of law anew through with "grave deference", agreed, and noted in addition the "synthesizing" process, but advised:

> " We might have a different case here if there were only the first bank robbery alone or perhaps if we had only the last bank robbery alone. Then, in such a case the differential between the witnesses' statements and the com-

posite might be so significant as to call for a conclusion that it became and was, in fact, an intentional misstatement." (Id at 511, ftnt. 8)

Lam argued below that the case at bar is that different case; here only one offense was being investigated and the witnesses relied upon for the investigation (Kwong, Efim, Vidales, Yee, and Silva) were comparatively few. The affiant's failure to include the results of the attempted sketch by Yee, his failure to note attempted but unsuccessful identifications by Vidalis and Silva, and his failure to note the unsuccessful attempts at identification by the other ten unidentified civilian witnesses are failures which would have gone to negate probable cause; those failures -- given the conscious failure to note the lack of commas in Exhibit "A", given the failure to include the identification information from the driver's license, and given the misrepresentation that the witnesses' descriptions matched Lam -- should be viewed, as the Young Buffalo court noted, as conscious omissions.

The "comma characteristic", aside from being common to everyone educated in Hong Kong.

adds nothing to probable cause if we know that Lam no longer uses it. The return address on the plant package is inconsistant with Lam's presumed usage and the physical description given does not match Lam either. And the affiant's assertion that the sketch of Vidalis looks like Lam loses force when Kwong says it doesn't.

In U.S. v. Chesher 654 F.2d 1285 (9th Cir. 1981), the Circuit had found that where the validity of a warrant rested on whether the target defendant was a Hell's Angel, and where the information included in the warrant relevant to that determination was "stale", that the failure of the affiant to ascertain the current membership status of the target was reckless; the court so held in spite of the fact that the affiant had no actual knowledge that his stale information was no longer correct. Rather the court held that:

> "The unexplained failure of an agent investigating Hell's Angels in California, with these extensive contacts with other investigators, to discover, for almost four years, a report written by an agent with the California Bureau of Narcotics, also tends

to support a claim of recklessness." (654 F.2d at 1297.)

In the case at bar, Elsesser relied on a three-year-old D.B.A. statement to show Lam's use of commas; Elsesser had actual and more recent knowledge that Lam did not use commas. Elsesser was not merely reckless in not finding out that the Vidalis composite did not look like Lam; he had actual knowledge that it did not. He was not merely reckless in failing to determine whether witness' descriptions fit Lam; he had actual knowledge that they did not. Under Chesher Elsesser was clearly "reckless"; indeed, if the failure to find information in Chesher was reckless, then the failure to disclose it when actual knowledge is had and other parts of the same documents or conversations are used, must be held to be intentional. And if the seemingly innocent mistake which resulted in a remand for hearing in U.S. v. Davis, 663 F.2d 824 (9th Cir. 1981), then a priori so must have been the intentional omissions, giving rise to deliberately or reckless false inferences in the warrant application here.

Moreover, Elsesser's conclusion upon comparing the license photo with the composite,

even standing alone and unchallenged by the omissions, is less than untainted. If a witness had been shown a one-photo show-up, and told that this person was the chief suspect, few courts would have difficulty in labeling that process overly suggestive. See, e.g., United States v. Fields 625 F.2d 862 (CA 9 1980). Precisely that is what was shown and told to the police artist for his first sketch.

The second sketch, "from" Vidalis' description is tainted by that suggestiveness. The sketch is the artist's, not Vidalis', and a more "leading" situation cannot be postulated. Until the artist beings to draw, how does a witness describe the curve of a nose, the degree of slant of an eye, the shape of a chin? The artist's hands shape the description and where, as here, the artist knows precisely where he is to wind up, the sketch cannot be found to be a reliable and objective recording of the description given by the witness. Especially when combined with:

1. The failure of many witnesses to identify Lam at all;

2. The inconclusive identification by Efim; and,

3. The physical descriptions which were given which do not match Lam, a magistrate could not reasonably have found that Lam was probably the person in line that day.

We are left with an assertion that Lam had a motive. In paragraph 11(a) the victim focuses on the defendant because they are "business competitors." The affiant notes, however, forty to fifty similar competitors in the same building. In 11(b) Kwong notes an "altercation", but one which would given Kwong reason to get back at this defendant -- Kwong lost the sale, and Kwong thought his (Kwong's) friend had been cheated. Nothing in 11(b) would appear to give Lam a motive for murder.

While this Court did note in U.S. v. Ventresca 380 U.S. 102 (1965) that

> ". . .affidavits for search warrants . . .must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings

have no proper place in this area, a grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. . . the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. . . ."

It is still true that

" The protection afforded by the fourth amendment stands as an important bulwark for people in a free society. Unreasonable searches, made without probable cause, threaten the very fabric of our democratic system. The search here was executed in the absence of probable cause. I think nothing is clearer in our jurisprudence than that the fruits of that search should be suppressed. I fear that by upholding the constitutionality of the search here, the majority's opinion will be read as an open invitation to issue warrants upon the

gossamers of suspicion and conjecture."

Brownes, Cir. Judge, dissenting in United States v. Melvin, 596 F.2d 492, 501 (1st Cir. 1979).

A warrant issued by a "neutral and detached" magistrate, from whom facts are selectively hidden, offers little protection indeed. With those facts included in this application only the "gossamer" thread exists.

II.

In the District Court, and again in the Court of Appeal, Petitioner asserted that unless the warrant application demonstrated probable cause to believe that he had mailed the bomb, and thus probable cause to arrest him, that it could not logically demonstrate probable cause to believe that the instrumentalities of the crime would be in his residence. Since the omissions in the affidavit all went to the question of Lam's involvement in the bombing, they were, Lam argued, material and their omission more critical. Thus the inference of intentionality, given the critical nature of the facts omitted, becomes stronger.

The Court of Appeals referred to this argument only in passing, though as the "principal contention", but made no attempt to apply the claim to the facts at bar. The law to be applied, however, is not clear.

No evidence appears in the warrant application to suggest the existance at 916 Ashiya Avenue of property connected to the crime except the assumption that Appellant had mailed the bomb, and the conclusion that the appellant lived at the location to be searched. As to the latter fact the government carefully established that the affiant had received a residence address for Appellant from the California Department of Motor Vehicles, and that inquiry of the local post office had led to a forwarding residence address (W.A. paragraph 14). The affiant then spoke with the mail carrier for the residence at that forwarding address and confirmed not only that a Lam lived there, but that the Lam shown in the driver's license photo was the same Lam with a booth next to the Kwongs, and that he lived at 916 Ashiya Avenue. (W.A. paragraph 15; see also identification of driver's license photo by Kwong (W.A. paragraph 31)).

None of that is relevant to anything, however, unless the Appellant had constructed the bomb; no testimony of neighbors who noticed strange objects, or of surveillance teams seeing objects being removed from the house, exists to connect the house to the objects of the search; no "hard" evidence of Appellant's involvement (such as finding some of a quantity of stolen explosives in a defendant's car (United States v. Picariello, 568 F.2d 222, 227 (C.A. 1 1978). See also, Haefeli v. Chernoff 526 F.2d 1314 (C.A. 1 1975)) existed either. Probable cause to believe that the objects would be at 916 Ashiya Avenue rested solely on a finding of probable cause to believe that Appellant had made and mailed the bomb. Expressed another way, sufficient evidence had to be known to the magistrate to justify issuance of an arrest warrant for Appellant.

The District Court agreed with this analysis (RT 8: 13-18), but it is not clear that the circuit applied it, and the ghost of Zurcher v. Stanford Daily, supra, haunts this opinion. In Zurcher, the government had evidence that materials were at a certain location, but the occupant was not a suspect in the underlying

investigation nor was possession of the materials illegal. In that context this Court could state that "it is untenable to conclude the property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest." (Zurcher, supra, at 559).

Of course, direct observation of the instrumentality of the crime is not a prerequisite either; as the Ninth Circuit had noted in U.S. v. Spearman, 532 F.2d 132 (9th Cir. 1976) at 133,

> ". . ., we have upheld many searches where the nexus between the items to be seized and the place to be searched rested not on direct observation. . .but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property."

It must first be established, though, that the target is a criminal and where that inference must be drawn from a warrant application there must be probable cause to believe it, and thus probable cause to arrest, because the test

of probable cause is the same for warrants to seize both persons and property. Zurcher v. Stanford Daily, 436 U.S. 547, 556-557 n. 6 (1978); Spinelli v. United States, 393 U.S. 410, 417 n. 5 (1969); Aguilar v. Texas, 378 U.S. 108, 112 n. 3 (1964); Giordenello v. United States, 357 U.S. 480, 485-486 (1958); Ex parte Burford, 7 U.S. (3 Cranch) 448, 451 (1806).

The Government relied below on four cases[1/] to support its contention that even without probable cause to believe that appellant had made the bomb, probable cause to search his residence for its components could exist. Examination of the facts in most of those cases reveals that they are clearly inapposite, and in fact establishes that while the Government's contention may find support in the 1st Circuit, it is not the law in the Ninth; this conflict should be resolved by this Court.

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1/ United States v. Melvin, 596 F.2d 492 (1st Cir. 1979); United States v. Lucarz, 430 F.2d 1051 (9th Cir. 1970); United States v. Hendershot, 614 F.2d 648 (9th Circ. 1980); and Grimaldi v. United States, 606 F.2d 332 (1st Cir. 1979); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) is addressed infra as well.

In Hendershot, probable cause to arrest the defendant had been separately established, a warrant had been issued, an arrest made, and these facts were averred in the affidavit in support of the warrant. (Hendershot, infra, at 650-1, ftnt. 1). Appellant there never challenged the probable cause thus incorporated "by reference" in the application and the question was not whether the subject of the search was tied to the crime, but whether the place to be searched -- a car -- was. Hendershot never addressed the question presented here. The reliance placed on it by the Government is puzzling.

In Lucarz, another case from the Ninth Circuit, the defendant had acknowledged receipt of a mail bag, seven hours later reported that it had been slit open and the registered mail it contained had been removed, and stated that he had neither left the post office in the meantime, nor had the bag left the car in which he had placed it. Another postal employee, however, had noticed the mailbag missing from the cart in which it should have been, and several employees had seen the defendant out of the building at various times; finally, five days

after the incident the defendant had changed his story about leaving the building. The Lucarz panel found:

> "In the case before us, we think it clear that the facts in the affidavit gave probable cause to believe the appellant had broken open the registry pouch. His custody of the pouch, the internal inconsistencies in his story, and the discrepancies between his version and those of others, all point strongly to the same conclusion." Lucarz, supra, at 1055. (Emphasis added.)

Only then did the Court of Appeals go on to determine whether, even given probable cause to believe that the defendant had stolen the checks, they would be at his residence; taken in context it is clear that in that case the Circuit was saying that the probable-cause-to-arrest finding was a prerequisite to, though not a substitute for, probable cause to search.

That same analysis finds support in a more recent of the Ninth Circuit's decisions, United States v. Chesher, supra. The question there was whether Chesher possessed indicia of

of Hell's Angels' activities. The Court held:

> "A showing of probable cause requires that the affidavit provide sufficient facts and circumstances to permit a reasonable person to conclude independently that Hells Angels indica was likely to be found in Chesher's home. See United States v. Moreno, 569 F.2d 1049, 1052-53 (9th Cir.), cert. denied, 435 U.S. 972, 98 S.Ct. 1615, 56 L.Ed. 2d 64 (1978). The link to such a conclusion, quite clearly, is a showing of probable cause to believe that Chesher was still a member or associate of the Club." Chesher, supra, at 1298.

Thus, where probable cuase to search depends on a "chain" of evidence, each link in that chain must be supported by probable cause. Otherwise, as in Chesher, and as in the case at bar, the chain breaks.

The Government relied below on two cases from the 1st Circuit which, it asserted, support the Government's reading of Zurcher.

In Grimaldi, the affidavit -- after excision of illegally seized evidence -- established that the defendant had recently purchased counter-

feiting equipment, and printer's ink, and was a known associate of persons who had passed counterfeit bills of the same printing as a negative for a bill recovered bearing the defendant's fingerprints. Thus, there was independent evidence that the subject would have the equipment, which he was known to have purchased, at the place to be searched. While Grimaldi seems to rely on previous holdings of that circuit, it, in fact, like Hendershot, supra, is sui generis and not directly applicable to the case at bar.

United States v. Melvin, 596 F.2d 492 (1st Cir. 1979), however, clearly supports the Government's argument by misreading Zurcher in exactly the same way as did the Government. (Melvin, supra, at 496-497). It, and to some extent, Zurcher itself, support the proposition that probable cause to arrest and probable cause to search are two different standards, with the standard for a search of a lower quantum than to arrest and thus, when the involvement of a suspect in a crime is a necessary ingredient of probable cause to search, that that involvement is subject to a lesser standard of proof than otherwise.

Nothing in the Fourth Amendment supports such a distinction and this Court should definitively so state.

CONCLUSION

Two facts stand forth clearly from the evidence and opinions in the case at bar. The first is that with full knowledge of facts which contradicted conclusions explicitly drawn or ones clearly implied, the affiant systematically omitted, from his warrant application, all facts which undermined the probable cause he was attempting to establish, facts which went to the core of the issue of whether Pak Shing Lam had mailed the bomb in this case.

The second fact which stands forth is that neither in the trial court's cryptic ruling, or the Court of Appeals' per curiam and without-oral-argument memorandum, has any judge come to grips with the questions raised by the pattern of omissions established in hearing. No court has found the omissions to have been immaterial, or negligent but excusable; the only inference to be drawn from the pattern, especially given the partial references to those parts of evidence which supported probable cause, is that the

omissions were intentional.

Had the application been complete, it would have contained a final concluding paragraph:

> "Affiant knows that Mr. Lam's actual physical description is substantially different from those given by witnesses to the mailing, and affiant knows this from official documents obtained from the State of California. Affiant also knows that the only person interviewed known to have had substantial opportunity to observe Lam has said that the composite drawn by a witness to the mailing does not resemble Lam. Affiant also knows that Lam does not use a comma consistantly in addresses, and that the most recent addresses written by Lam do not use it at all. Affiant also knows that Lam does not use a return address on jewelry packages consistant with the initials found on the bomb parcel. Finally, Affiant knows that no witness to the mailing interviewed, including the person who accepted the parcel, identified Lam from photo-spreads shown to them but

several of the witnesses did tentatively identify other oriental males as having been in the post office that night."

The only element from Franks missing in this case is the inspector's admission that he intended to mislead the magistrate, yet such an admission will almost never occur. Intent must usually be inferred and if Franks is to have any meaning when an officer selectively avers, rather than affirmatively misrepresents, facts in an affidavit for a warrant, then this court should delineate what kinds of inferences should be drawn from patterns such as that in the case at bar. For all these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT P. APP
Attorney at Law
Giles, Stewart
and Barnett
1502 N. Broadway
Santa Ana, California
92706
714/544-4132

Appendix

LOS ANGELES, CALIFORNIA
TUESDAY, APRIL 7, 1981, 9:30 A.M.

--oOo--

THE CLERK: Item No. 3 on the calendar, Criminal 81-140, United States versus Pak Shing Lam.

MR. MacINTYRE: Darrell MacIntyre for the government, your Honor.

MR. APP: Robert App for Pak Shing Lam, your Honor.

MR. REEVES: Robert Reeves for Pak Shing Lam.

THE COURT: All right. On the motion, I think there was not a sufficient showing that any false statement was made knowingly or intentionally or with reckless regard for the truth or disregard for the truth. I don't find any such statements included in the warrant affidavit by the client. (sic) I don't find any perjury or reckless disregard of the truth.

I think there is enough in the warrant affidavit to establish probable cause. So the motion is denied.

APPENDIX

EXHIBIT B.

F I L E D
MAR 15 1982

Clerk, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATE OF AMERICA,	
	NO. 81-1340
Plaintiff-Appellee,	D.C.No.81-140-1
-vs-	M E M O R A N D U M
PAK SHING LAM,	
Defendant-Appellant.	

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Submitted January 27, 1982*

BEFORE: CHOY, ALARCON and CANBY, Circuit Judges

Pak Shing Lam appeals his conviction of mailing an explosive device in violation of 18 U.S.C. § 1716(a) and of possessing an unregistered firearm in violation of 26 U.S.C. § 5861(d). The sole question presented here is whether the warrant for the search of Lam's residence was

*The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A. 9th Cir. R. 3(a) and Fed. R. App. P. 34(b)

supported by probable cause. We conclude that it was, and accordingly affirm.

Lam's principal contention is that the search warrant can only be regarded as furnishing probable cause for a search if it also furnished probable cause to believe that Lam was the person who mailed the explosive device. He argues that, because of omissions in the affidavit used to procure the warrant, probable cause was lacking. Lam contends that the omissions were either made knowingly and intentionally or with reckless disregard for the truth, within the meaning of Franks v. Delaware, 438 U.S. 154 (1978).

Even under Lam's formulation of the probable cause requirements, there was no error in denying the motion to suppress. Franks v. Delaware, supra, and United States v. Chesher, No. 80-1011 (9th Cir. filed March 30, 1981, amended June 3, 1981)(consolidated case, United States v. McConney, No. 80-1012 has been withdrawn to be considered en banc), upon which Lam relies, were concerned with the question whether a sufficient showing of intentional or reckless falsity in the affidavit had been made so as to require an evidentiary hearing. In Lam's case the district court did hold an evidentiary hearing. At that hearing, it was incumbent upon Lam to establish "perjury or reckless disregard" and that "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." Franks, 438 U.S. at 156. The information that Lam contends should have been included by the affiant, relating to discrepancies in the physical description of Lam, his failure to use a comma after

the number in an address on one occasion (when the affidavit reported two instances where he had), or failure of some witnesses to identify Lam's photograph, did not amount to a showing that false statements or distortions were made knowingly or intentionally or with reckless disregard for the truth. The district court's finding to that effect is entitled to affirmance whether it is judged by the "clearly erroneous" standard, see United States v. O'Connor, 658 F.2d 688, 690-691 (9th Cir. 1981), or by the more stringent independent review employed in Chesher, supra. The omissions in the present affidavit fall far short of the kind of intentional or reckless falsehoods preliminarily shown to have been incorporated in the affidavits in Frank and Chesher.

Because we affirm the finding of the district court that the omissions did not amount to intentional or reckless falsehoods, we need not reach the question of their materiality.

AFFIRMED.

APPENDIX

EXHIBIT C.

UNITED STATES DISTRICT COURT
FOR THE
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA)	
)	CASE NO. 81-125M
vs.)	
)	AFFIDAVIT FOR
THE PREMISES KNOWN AS)	SEARCH WARRANT
916 ASHIYA AVENUE)	
MONTEBELLO, CALIFORNIA)	
	Los Angeles,
BEFORE JOHN R. KRONENBERG	California

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) 916 Ashiya Avenue, Montebello, California, the building further described as a family residence, located on the north side of Ashiya Avenue, just west of the intersection of Ashiya Avenue and Villa Street, sandy/tan in color with dark brown trim, having an attached two-car garage in front, with access to the residence on the west side of the garage; a wrought iron gate stands on the west side and the numbers "916" appear on the street curb directly in front and on garage;

in the CENTRAL District of CALIFORNIA is now being concealed certain property, namely

(a) A typewriter of unknown manufacture, possible a Smith Corona/Marchant, pica type style, with letters spaced ten (10) characters to the horizontal inch.

(b) Eureka mailing labels and packaging, bearing a distinctive blue arrow through the face of the label.

(c) Lined three ring notebook paper, measuring approximately 8-1/4 inch in width and 10-1/4 inches in length.

(d) Plastic zip lock bags of unknown manufacture.

(e) Whole Archer Sub-Mini lamps, 1.5V, and fragments thereof and packaging for same.

(f) A Form 3806 reflecting mailing of registered article #781426 at Terminal Annex on December 15, 1980.

(g) White string type cord.

(h) Segments or pieces of brown lamp cord of unknown gauge.

(i) A Leviton AC 125 volt lamp type switch and packaging for same.

(j) Wiring diagrams and books or pamphlets on bomb making.

(k) Containers of gasoline.

(l) Documents identifying the purchases of afore described materials.

which are the fruits, instrumentalities, and evidence of violations of Title 18, United States Code, Section 1716 (Mail of Injurious Articles).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

AFFIDAVIT

1. I, K. A. Elsesser, having been duly sworn hereby depose an say:

2. I am a Postal Inspector assigned to the U.S. Postal Inspection Service Headquarters, Los Angeles Division, Los Angeles, CA. I have been assigned to the investigation of Prohibited Mailing and Fraud cases for the past nine years. Included in these investigations are cases involving use of the mails for the carriage of destructive devices.

3. This affidavit is made in support of an application for a search warrant. The search warrant is being sought to search a residence, in connection with a Postal Inspection Service investigation of the mailing of a destructive device at the Terminal Annex Post Office, on December 15, 1980; the mailing of this parcel being a violation of Title 18, United States Code, Section 1716 (Mailing of injurious Articles) and other federal statutes.

4. During the course of this investigation, I have been designated as the Team Leader, directing the activities of several other Inspectors in this investigation and am familiar with the results of their inquiries. The facts in paragraphs 5-11, 18-25 and 30-37 have been

gathered and related to me by other investigators. The other paragraphs are based upon my personal knowledge, unless otherwise indicated.

5. On December 16, 1980, a registered parcel, Register No. 784126, was delivered by Mr. Marco Robert Perez, Jr., Regular Carrier, United States Postal Service, to 1907 Griffith Park Boulevard, Los Angeles, CA 90039. The parcel was addressed as follows:

Mr. Antonio Kwong
1905, Griffith Park Blvd.
Los Angeles, CA 90039

It bore the following return address:

B. T. E.
144, San Pedro St.
Los Angeles, CA 90012

6. Mr. Perez delivered the parcel to Ms. Kathy Kwong, the addressee's sister, at her apartment next door to the 1905 Griffith Park Boulevard address. At approximately 5:30 PM, Mr. Antonio Kwong, the addressee, checked with his sister Kathy and obtained the parcel. Upon examination, Antonio Kwong thought the parcel was possibly for his wife's, Christina's jewelry business. He made a mental note that it was addressed to Antonio Kwong, which he only uses on his wife's jewelry business card and in the telephone directory. All his friends know him by the name Tony. He shook the parcel and noticed the faint odor of a flammable liquid.

7. Antonio Kwong then took the parcel and drove to his wife's business, located at 637 South Hill Street, Los Angeles, CA and picked her up.

While driving, Christina Kwong examined the parcel and thought because of the return address it might have something to do with her bank, which is located at 120 South San Pedro Street. Antonio and Christina Kwong drove to the return address, 144 San Pedro Street, which they determined was non-existent. They became suspicious and shook the parcel several times attempting to determine the contents. At this time the odor of a flammable liquid was becoming very strong in their car. They decided to drive to the Los Angeles Police Department Headquarters at 150 North Los Angeles Street and report the parcel. They were unable to find a parking spot in the immediate area and drove to the LAPD Rampart Division, located at 2710 West Temple. They brought the parcel into the Rampart Division and turned it over to Officer Espinoza, No. 20140, the desk officer. Officer Espinoza also noticed the odor of flammable liquid and notified the Los Angeles Police Department Bomb Squad.

8. In response to Espinoza's notification, Detectives A. McCree and D. Weller of the LAPD Scientific Investigations Division Bomb Squad arrived and evacuated the police station and removed the device to the intersection of Benton and Temple Streets which had been closed down to vehicular traffic.

9. Render safe procedures were used on the parcel by the officers. During this process, Detective Weller removed the address label from the front of the parcel. Detective McCree attempted to open the parcel remotely, which caused the devise to explode and burn. Based on Detective McCree's expertise and experience, the explosion and resulting fireball would have seriously injured, if not killed, any person

who would have been holding the parcel. Detectives McCree and Weller collected the remaining physical evidence from the scene and made a preliminary examination of the device.

10. McCree determined the device contained the following components: a 125 volt AC lamp-type chain switch manufactured by Leviton, which had multi-strand, 14 gauge copper wire internally attached. The insulation material on the wire had been burned away; b) a nine volt, heavy duty transistor battery, No. D-1604, manufactured by Ray-O-Vac Company with a unit number of RERC on the base; c) four (4) 1.5 volt Archer Sub-Mini lamps with red and white insulated leg wires. [These Archer Sub-Mini lamps are sold by Tandy Corporation through Radio Shack outlets under catalog No. 272-1139;] d) three plastic zipper lock bags containing tissue type paper, soaked in some substance similar to, and smelling like gasoline; e) several sheets of what appeared to be wadded up notebook paper and a length of string or cord. The physical evidence was subsequently photographed by the Los Angeles Police Department Crime Lab. The photographs taken are attached as Attachment A.

11. On January 19, 1981, I was advised by Detective II Lee D. Prentiss, Criminal Conspiracy Section, Los Angeles Police Department, along with his partner Detective II Ed Brimmer, that on December 16, 1980, they interviewed both Antonio and Christina Kwong concerning the receipt of the parcel. When questioned concerning any possible suspects in the case, Antonio Kwong indicated the following:

(a) The only person he could think of was a Felix Lam. Antonio Kwong indicated that Felix

Lam was a business competitor of his wife's jewelry business. Both Lam's and Mrs. Kwong's businesses are located in booths in a wholesale jewelry mart at 637-639 Hill St., Los Angeles. Mrs. Kwong's booth is Number D10 and Mr. Lam's booth is Number C10. The booths are separated by an aisle of approximately 6 feet. Both Booth C10 and D10 are approximately 36 to 40 sq. ft. in size. The building that they are located in contains 40 to 50 similar booths of independent jewelers.

(b) Antonio Kwong further indicated that on Sunday, December 14, 1980, he had a verbal altercation with Felix Lam concerning a customer. The altercation involved Antonio Kwong accusing Felix Lam of cheating a female customer of his by having sold her an item for $250 which had a value of approximately $50. What further compounded the situation was the fact that the customer was a personal friend of Antonio Kwong's and had been more or less taken away from his booth by Felix Lam.

(c) The Kwong's described Felix Lam as being a male, oriental, of Chinese extraction, approximately 30 years of age, 5'6" in height, weighing approximately 140 lbs., and from Hong Kong.

(d) In addition, during the interview, Christina Kwong indicated to Detective Prentiss that the address on the parcel bore a unique characteristic. This characteristic was that after the numerals in the street address on both the addressee and sender portion, a comma appeared. She stated that this peculiarity is common to persons who are educated in Hong Kong. (The fact of the comma appearing behind the

numerals of the street address was discussed by Detective Prentiss with an individual educated in Hong Kong and found to be a unique characteristic of their educational system.

12. On December 23, 1980, I personally interviewed Antonio and Christina Kwong concerning their receipt of the parcel. During the interview, Christina Kwong indicated that Felix Lam, in addition to his business at the jewelry mart, had a Post Office Box at the Terminal Annex, Los Angeles Post Office. In addition, Christina Kwong indicated that she had observed Felix Lam's wife, Grace Lam, utilizing a typewriter in the sales booth at the jewelry mart on at least one occasion. She believed this had occurred some time during November, 1980. Subsequent to this observation, she had not observed a typewriter at that location.

13. I have personally reviewed the records of the Box Section, Terminal Annex Post Office, and determined that a post office box was rented on June 26, 1978 by Pak Shing Lam, under the business name Shing Fong Jade Company, dba Jade City. Upon opening the post office box, Pak Shing Lam provided California Driver License No. N7044917 as identification.

14. On December 23, 1980, I personally contacted the California Department of Motor Vehicles, concerning Driver License No. N7044917. I was advised by the California Department of Motor Vehicles that that license was issued to Pak Shing Lam, 514 South Mariposa, Los Angeles, CA 90020, in April, 1980. Subsequent inquiry with the Post Office serving 514 South Mariposa in Los Angeles determined that Pak Shing Lam had moved from that address to

916 Ashiya Avenue, Montebello, CA.

15. On December 30, 1980, I personally interviewed Ms. Beverly Lanza, Regular Carrier, Montebello, CA, Post Office, concerning the 916 Ashiya Avenue address. She indicated the Lam family had resided at that address for only a short time. She positively identified a photograph of Pak Shing Lam as the individual residing at that address. She further indicated that the Lams receive a lot of accountable mail (registered mail), from Hong Kong, and believes she remembers a label similar to the one on the bomb parcel going to the residence.

16. I have personally checked the records of the Los Angeles County Clerk, Incorporations Division, and determined that a fictitious business name statement, File No. 77-42836, was filed by Pak Shing Lam and Sau Fong Lam, under the fictitious business name of Shing Fong Jade Company, 310 W. Fourth Street, Los Angeles, CA 90031. This statement was filed on October 3, 1977, and indicates the business was being conducted as a general partnership. A review of the handwritten statement, a photocopy attached herewith as Attachment B, reveals that on two separate lines a comma appears after the numbers in the residence address of the registrant. This characteristic is identical to that which is on the address label on the bomb parcel.

17. The address label on the bomb parcel was typewritten. The label itself bears a distinctive blue arrow running from left to right across the middle of the label which is not common to most commercially available labels in the Los Angeles area. A canvass of the area

around Lam's business address by Postal Inspector L. W. Bunger and myself determined that there were numerous business firms which sold mailing labels within a two or three block radius. The label, described above, is manufactured by Eureka Products Company, Troy, PA, was only available at J. J. Newberry Company, 445 South Broadway, Los Angeles, CA. The label, Item No. 54129, is a self-sticking label, which comes 15 labels to a package.

18. I have been advised by Postal Inspector L. W. Bunger that on January 7, 1981, he contacted Mr. Rod Adams, manufacturer's representative for Eureka, in the Southern California area. Mr. Adams indicated that Eureka Label No. 54129 is sold to the Coronet Stores, 411 Arroyo, Pasadena, CA, and to Lucky Discount Centers, in addition to Newberry's in the Southern California area. In addition, Inspector Bunger has advised me that he contacted the Regional Office, Lucky Stores, in Buena Park, CA, and determined that the label is a standard item carried in approximately 160-180 Lucky/Gemco Stores in Southern California, Arizona and Nevada.

19. On January 14, 1981, I was advised by Mr. Drew Somerford, Postal Inspection Service Crime Laboratory, Washington, D.C., that he had completed a preliminary examination of the typewritten mailing label. It was his opinion that the label was probably typed on a Smith-Corona/Marchant typewriter. He described the type as being pica with 10 characters to a horizontal inch. In addition, it appeared that the ribbon on the typewriter was carbon and not a fabric-type ribbon.

20. I have been told by Postal Inspector P. T. F. Mau that on December 18, 1980, he personally interviewed Miss Lilly Yee, Regular Clerk, United States Postal Service, Terminal Annex, concerning her acceptance of the parcel on December 15, 1980. Miss Yee indicated that the parcel was mailed by a man who was definitely not a Caucasian or Black. She further recalled the parcel was well wrapped and taped with brown paper. When she was preparing the parcel for dispatch, there was a funny odor, which she thought was glue on the parcel.

21. I have been told by Detective II Lee Prentiss that he interviewed Ms. Lilly Yee on December 23, 1980, concerning the parcel in conjunction with an attempt by LAPD sketch artist Fernando Ponce to obtain a composite sketch of the suspect from her. During the interview, she indicated that the person mailing the parcel was an Oriental male, approximately 5'6" in height, whom she believed to be between 30 and 50 years of age. She further stated that all Orientals looked the same to her and she could not tell one nationality within the racial group from another.

22. Between December 27, 1980 and January 13, 1981, 12 interviews have been conducted of persons who were in the registry line, Terminal Annex Post Office, on December 15, 1980, during the time the bomb parcel was mailed. It has been determined that the customer line on December 15, 1980 was quite heavy and persons had to wait up to an hour and a half in the line to mail their registered articles. The physical setup in the Terminal Annex Post Office segregates the mailers of registered articles from the routine, ordinary customers. The

physical setup restricts postal customers at the registry window to one line; however, due to the large volume of business on the evening of December 15, the line was split by a postal supervisor forming two separate lines. The split in the line was made by a postal supervisor who directed several of the people in the front of the line to the window staffed by Lilly Yee.

23. I have been told by Postal Inspector P. T. F. Mau that he and Inspector L. W. Bunger interviewed Mr. Carl Efim, one of the individuals in the registry line on December 15, 1980, concerning his observations on that evening. Mr. Efim stated that he recalled mailing registered articles at the Terminal Annex on Monday, December 15, 1980. He was there from approximately 7:10 to 8:00 p.m. On that evening he mailed 13 registered articles. Because of the long wait in line, he left the line to make a telephone call and was advised by a security police officer that he should not leave the line. Mr. Efim was asked if he could describe anyone who might have been ahead of him in the line while he waited. He could not specifically recall anybody he could describe. He did, however, state that there were approximately 20 persons behind him and he was third in line from the front when a postal supervisor came out and split the line, directing people behind him to another window. He was shown several photographic identification spreads by Inspector Mau. The subjects of these spreads were male negros, male Caucasians, male Latins, and male Orientals. He examined the two Oriental photograph identification spreads and focused on Felix Lam's photograph in one spread and another

subject in the other. He further stated that he had mailed parcels all that week and could not specifically recall when he had seen these individuals.

24. Inspector Mau further told me that on December 29, 1980, he interviewed Security Police Officer James Vidalis, United States Postal Service, Terminal Annex, with Inspector Bunger. SPO Vidalis recalled that he was on duty on Monday, December 15, 1980, at the Terminal Annex. He further recalled that he did advise a man not to leave the customer line. While near the registry section, Vidalis recalled directing a Chinese family from window No. 2 to window No. 1. He described the family as a man and wife, both in their late 20's, with a small, 10-year old child. SPO Vidalis further informed Inspector Mau that he saw an Oriental man wearing what looked like a golf cap in the line. The man was short and had on a light shirt. He further described a man in his mid forties, dark-complected, possibly from India, wearing a brown coat as being in the registry line.

25. On January 8, 1981, SPO Vidalis was interviewed by Detective II Lee Prentiss and myself at the Los Angeles Police Department headquarters. As part of the interview, SPO Vidalis and Fernando Ponce collaborated on a composite drawing of the individual Vidalis had observed in the registry line on December 15, 1980. The composite, drawn by Sketch Artist Ponce, was a profile sketch of an individual wearing a cap. A copy of the sketch is attached herewith as Exhibit C.

26. An interview of Mrs. Roberta Silva, 2005

Valley Street, Los Angeles, CA, another individual in the registry line on December 15, 1980, was conducted by Inspector L. W. Bunger and myself. During the interview, Mrs. Silva stated that a Mexican couple was in line directly in front of her on that evening. This couple was served by the second window clerk in the registry section. Mrs. Silva was waited on by an Oriental female window clerk, who has been identified as Miss Yee. She further indicated that a small, heavy Chinese man was directly in front of the Mexican couple in line. The Chinese man was holding a small package. She did not recall how the Chinese man was dressed, or whether or not he was wearing a hat, but she did indicate that she might be able to recognize him if she saw him again. Mrs. Silva then stated that the Chinese man was waited on by the Oriental, female clerk, Lily Yee, just prior to her having been helped by Ms. Yee.

27. I have personally checked the records of the registry section, Terminal Annex Post Office, and have determined that Mrs. Silva's registered parcel was the next transaction conducted at Lily Yee's window after the bomb parcel. Attached herewith are copies of the registry records reflecting the acceptance of the bomb parcel and Mrs. Silva's parcel (Attachment D).

28. On January 2, 1981, I went to the Lam's business location at 673-639 South Hill Street, Booth No. C-10. On that date I purchased a set of gold jade earrings and had them mailed to a friend of mine in the area. Mrs. Kwong told me that she, subsequent to my departure, overheard Mrs. Lam telephonically contacting her husband and indicating that I had made a

purchase, which would have to be mailed. Later in the afternoon, Mrs. Kwong observed Felix Lam taking over the operation of the booth and his wife leaving.

29. At approximately 8:00 p.m. on January 2, 1981, I personally went to the registry section, Terminal Annex Post Office and recovered a parcel addressed to a name and address I had given Mrs. Lam earlier in the day. I then interviewed the accepting clerk, who indicated the parcel had been mailed by a male Oriental sometime between 7:30 and 8:00 p.m. on that evening. The clerk reviewed a photographic spread, including a picture of Lam and indicated that a photograph of Lam and one individual closely resembled the mailer of the parcel.

30. Based on information developed from various sources during the investigation, on January 7, 1981, LAPD sketch artist Fernando Ponce was requested by Detective II Lee Prentiss to prepare a composite sketch from the California driver's license issued to Felix Lam. Sketch artist Ponce was requested to remove the glasses worn by Lam in the photograph and place a golf-type hat on his head. This request resulted in a composite sketch (Attachment E). As previously indicated, on January 8, 1981, a composite based on descriptions provided by SPO Vidalis was drawn by Sketch Artist Ponce. At the conclusion of the interview with SPO Vidalis by Detective II Prentiss and myself, he and I noticed a striking similarity between the profile composite (Attachment C) prepared from Vidalis' description and the composite sketch drawn from Lam's driver's license (Attachment E).

31. On January 12, 1981, Christina Kwong told me that Felix Lam's shop was closed on Monday, December 15, and was not opened until noon on December 16, 1980. She further positively identified the driver's license of Pak Shing Lam, California Driver's License No. N7044917 as the individual known to her as Felix Lam.

32. I have personally been involved in the investigation of bomb cases, where the U. S. Mails have been used, for approximately nine years. During this time, I have never experienced the use a device similar to the one used in this case.

35. I have had training in the investigation on bomb related cases, which includes in-service training, and a course presented by the National Bomb Data Center, the National Bomb Coordination Organization operated by the Federal Bureau of Investigation.

34. Based on my training and experience, I have made the following observations concerning the mailing and construction of the device:

(a) The person mailing the parcel had previous knowledge of postal procedures. This due to the wrapping of the parcel without scotch tape which is not allowed on registered articles.

(b) The use of initials on the return portion of the label is a characteristic of many jewelry mailers, who do this to avoid easy identification as a valuable article, and makes acceptance as a normal business parcel by the addressees likely.

(c) Mailing of the parcel via registered mail raises the chances of delivery to the addressee due to postal regulations concerning delivery of accountable mail.

(d) In several bomb cases, I have noted that parts and other materials used in the construction of the device and parcel have been left at the sight of construction after the device has been mailed.

35. I have been told on January 27, 1981 by Detective II Lee D. Prentiss, LAPD, Criminal Conspiracy Section that:

(a) The Criminal Conspiracy Section, LAPD is the section which is assigned all bomb investigations within the City of Los Angeles.

(b) He has been assigned to that unit for seven years.

(c) During this time he had conducted in excess of 60 investigations in bomb related materials, including search of 12 locations where bombs were made.

(d) He has had formal training in explosive devices/investigations of bomb crime scenes, which includes Redstone Arsenal, 3 weeks in Render Safe (military training), 1 week FBI school on bomb scenes, testified as expert in State Court.

36. Detective II Lee D. Prentiss has told me

based on his experience, he has made the following observations concerning the construction of the destruction device in this mailing:

(a) It is not similar to any previous device which he has investigated.

(b) Its construction was less than a professional/experienced individual would be expected to make.

(c) Parts that are unique to this particular explosive device are kept in homes, such as the toilet papers, zip-lock bag, notebook paper, brown wrapping paper, mailing labels, white string-type cord, can be identified as parts of the device.

(d) That the individual who constructed the device was unfamiliar with the availability of gunpowders and the ease in obtaining them in the United States.

(e) That persons constructing explosive devices will experiment with circuitry and construction prior to making the actual device. The persons will have leftover parts from experimentation and for possible future bomb construction.

(f) In many of his investigations, materials including drawings, books on bomb construction, component materials are left where the bombs have been constructed.

(g) Bomb makers use explosive devices for anonymity believing the device will be destroyed. Media coverage indicated the device in this case was destroyed.

(h) Bombmaker generally feels that the victim will be killed and there is less likelihood of identifying him through the victim.

37. Detective Lee D. Prentiss has told me based on his experience the search warrant, being requested approximately 43 days after the bomb was mailed, is not stale because:

(a) 90% of the articles the bomber used he will not think of destroying such as typewriter, remainder of distinctive mailing labels, extra archer mini-lamps, and brown wrapping paper;

(b) the bomber was not successful and will have and maintain components around his house to improve and to make another bomb; and

(c) the bomber also will have booklets and pamphlets on bomb making.

38. Based on my investigation and experience, there is only one location where Felix Lam would have the necessary privacy to construct the device, his home. It appears that the majority of his business and personal mail is directed to the 419 Ashiya Avenue address. This and my observations of his business sales both lead me to believe he conducts the majority of his business activities from his residence.

39. Since December 16, 1980, members of the Postal Inspection Service have been giving daily attention to the investigation of this bombing. During the period, December 1, 1980 through January 18, 1981, approximately 774 manhours of investigative effort have gone into this investigation. This does not include any laboratory examination time or the time of the Los Angeles Police Department.

/s/
K. A. ELSESSER
Postal Inspector

Sworn and subscribed to before
me this 29th day of January, 1981

/s/
UNITED STATES MAGISTRATE

APPEARANCE OF COUNSEL

AND

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, hereby enters his appearance in the within bound matter and certifies that his address for service of process is

ROBERT P. APP, ESQ.
Giles, Stewart and Barnett
1502 N. Broadway
Santa Ana, California
92706
714/544-4132

Undersigned counsel hereby certifies in accordance with Rule 28.5(b) that service of the within bound Petition for a Writ of Certiorari has been made upon all necessary parties by mailing copies thereof, in triplicate, this ____ day of May, 1982, first-class postage paid, on

Mr. Darrell W. MacIntyre
Assistant United States Attorney
U.S. Attorneys Office
312 N. Spring Street
Los Angeles, California 90012

and,

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Signed,

ROBERT P. APP
Member, Bar of the
United States Supreme
Court